

Kumara Pillai and Vaidhilingam, JJ.

A.S.520 of 1949 (M).

JUDGMENT

delivered by Kumara Pillai, J.

This appeal arises out of a suit for partition. Parties are Muhammadans. There ~~were~~ two sisters named Pathumma Kutty Umma and Kathesasa Kutty Umma, and under Ex-Al Karar dated 26-9-1896 executed by the heirs of Pathumma Kutty Umma and by her sister Kathesasa Kutty Umma and their brother Ammotti Haji, certain properties were allotted to Kathesasa Kutty Umma and the heirs of Pathumma Kutty Umma as tenants in common, the share of Kathesasa Kutty Umma in those properties being 1/3. It is the property which Kathesasa Kutty Umma got under Ex-Al, that is now sought to be divided. Kathesasa Kutty Umma had one son named Abdul Kader and two daughters, one of whom predeceased without leaving any ~~male~~ issue.

Defendant 1 is Abdul Kader's son. After the deaths of Kathesasa Kutty Umma and Abdul Kader, defendant 1 and his mother, i.e., Abdul Kader's widow, jointly executed an assignment Ex-Al3 in favour of the plaintiff on 3-5-1945 conveying to him the share which Abdul Kader had obtained in the plaintiff properties as one of the heirs of Kathesasa Kutty Umma.

On 20-4-1945, plaintiff also took another assignment Ex-Al4 from defendant 4 who was one of the sons of Kathesasa Kutty Umma's daughter Beovi, who had survived and who died subsequently. According to the plaintiff, Abdul Kader ~~had~~ had 2/3 rights in Kathesasa Kutty's properties and Beovi 1/3 right. Defendant 4 had 1/6 right in Beovi's share. Plaintiff brought the suit for partition of the shares he got under Ex-Al3 and Al4, his case being that he was entitled to 14/36 of the plaintiff properties which were the entire properties which Kathesasa Kutty Umma and the children of Pathumma Kutty Umma

got

got under Ex-Al. Plaintiff claims that he got 6/18 share in the plaint proportion by virtue of Ex-Al3 and 1/18 by virtue of Ex-Al4. Kathcessa Kutty Umma's daughter Beewi had 5 children namely, defendants 2, 3, 4 and 5 and a daughter named Marian Kutty who is now dead and whose husband is defendant 6. Defendants 7, 8, 9, 10 and 11 are the children of Mariamkutty and defendant 6. Defendant 47 is the assignee from the husband of one Kunhi Ayissumma who was a predeceased daughter of Kathcessakutty Umma already referred to.

In the lower court, defendants 2, 3, 4, 5, 6, 7 and 47 filed ~~of~~ written statements, defendant 6's written statement being on his own behalf as well as on behalf of defendants 8, 9, 10 and 11 who were minors and whose guardian he was. The plaintiff's suit was brought on the basic that, in respect of separate properties, Kathcessa Kutty Umma was governed by the Muhammedan Law. This position was accepted by defendants 2, 3, 4, 5, 6 and 7 and they also claimed shares in the lower court in the plaint-properties on this basic. Defendant 47 contended that Kunhi Ayissa Umma was also entitled to a share in Kathcessa Kutty Umma's properties, that Kunhi Ayissa Umma's husband had obtained a share in Kunhi Ayissa Umma's share on her death and that he (the husband) assigned his share to defendant 47.

The lower court found that defendant 47 had not proved the date of Kunhi Ayissumma's death and that therefore established that her husband had taken any share in Kathcessa Kutty Umma's properties. Consequently, it refused to uphold the validity of the assignment taken by defendant 47. Although defendants 2, 3, 4, 5, 6 and 7 have conceded that in respect of the plaint properties, Kathcessa Kutty Umma was governed by the Muhammedan Law, the lower court found that she was governed by the Marumakkathayam Law and therefore, it gave a decree to

to the plaintiff only for 1/18 of the plaint properties. Plaintiff has therefore, filed this appeal, his contention here being that Kathoessa Kutty Umme was governed by the Muhammadan Law and that he is entitled to 7/18 of the plaint-properties. Defendant 47 also has filed a memorandum of objection contending for the validity of the assignment taken by him from Kashi Aylissa Umme's husband.

Defendants 8 and 10 attained majority after the appeal was filed; and after they attained majority, they engaged a separate counsel in this court and filed a petition here repudiating the written-statement filed by defendant 6 on their behalf and contending that Kathoessa Kutty Umme was governed by the Marumakkathayam Law and not by the Muhammadan Law.

If Kathoessa Kutty Umme was governed by the Marumakkathayam Law, defendants 8 and 10 would be entitled to ~~only~~ 2/9 of her properties. Defendants 2, 3, 4, 5 and 7 would, in that case, be entitled to 5/9 of the plaint-properties. It is significant that those persons, who were entitled to more than 1/2 share of the properties which belonged to Kathoessakutty Umme, had admitted in the lower court that Kathoessakutty Umme was governed by the Muhammadan Law and not by the Marumakkathayam Law. Defendants 4 and 7 still ~~not~~ speak to that position in this court. Defendants 2, 3 and 5 have/committed themselves to any definite decision in this court, but it has to be stated that their counsel Mr. Belakrishna Eredi stated at the time of hearing that he had received instructions from them to oppose the plaintiff's claim. Considering the unequivocal admission made by them in the lower court, we are inclined to think that their present attitude is a result of pressure brought to bear on them by defendants 8 and 10. Having regard to the admissions made by defendants 2, 3, 4, 5 and 7 in the lower court,

we are inclined to hold that Kathesaa Kutty Umma was governed really by the Muhammadan Law and not by the Marumakkethayam Law. But the ~~fact~~ fact remains that defendants 8 and 10 have now repudiated the written-statement filed by defendant 6 on their behalf in the lower court and that as they attained majority only after this appeal was filed, an opportunity ~~to~~ has normally been given to them to substantiate their case that Kathesaa Kutty Umma was governed by the Marumakkethayam Law. Even if she was governed by the Marumakkethayam Law, defendants 8 and 10 would be entitled only to ~~the~~ 2/9 of her properties and the persons who are entitled to 5/9 had clearly admitted in the lower court that she was governed by the Muhammadan Law. The persons who are entitled to the remaining 2/9 are defendants 9 and 11. Defendant 11 has not repudiated the written-statement that his father, in the lower court as his guardian admitted that Kathesaa Kutty Umma was governed by the Muhammadan Law. Defendant 9 attained majority during the course of the suit and she died only after the appeal was filed in this court. Till her death she too had not repudiated the written-statement filed on her behalf by defendant 6 admit that Kathesaa Kutty Umma was governed by Muhammadan Law. In the circumstances, what the defendants 8 and 10 can urge is that they should be given their legitimate share in Kathesaa Kutty Umma's properties on the basis that she was governed by the Marumakkethayam Law.

Although the plaintiff's case that Kathesaa Kutty Umma was governed by the Muhammadan Law appears prima facie to be true, plaintiff's counsel stated that with a view to avoid delay and further complications, plaintiff was willing to surrender 2/9 share from the share that he has got under Exs-A13 and A14 to defendants 8 and 10. In view of this surrender by the plaintiff, we do not consider it necessary to give defendants 8 and 10 an opportunity to substantiate

their

their case that Kathesakutty Umma was governed by the Muhammedan Law. Further, the case which defendants 8 and 10 have put forward, namely that their guardian, their father, had acted fraudulently in filing the written statement, is a contention which properly speaking, should be raised by way of a fresh suit.

So far as defendant 47's memorandum of objections is concerned, we are of the opinion that the lower court was right in refusing to uphold the validity of the assignment given by Kunhi Ayissuuma's husband to him. Although the case of defendant 47 is that Kunhi Ayissa Umma had survived Kathesakutty Umma and thereby obtained a share in Kathesakutty Umma's property on her death, defendant 47 has adduced absolutely no evidence as regards the date of Kunhi Ayissa Umma's death.

The only other matter argued at the Bar was the claim made by the plaintiff in respect of mesne profits. The lower court has awarded to the plaintiff mesne profits only in respect of 1/18 share ~~is~~ given to him by the preliminary decree. Plaintiff's counsel urged that in view of our finding that Kathesakutty Umma was governed by Muhammedan Law and in view of the admissions of defendants 2, 3, 4, 5 and 6 and 7, he was entitled to all the shares claimed by him in the plaint or at least to 5/18 in the plaint properties and that he was entitled to get a decree for mesne profits in respect of that share.

So far as the question of mesne profits is concerned, it has to be said that defendant 12, from whom the mesne profits are claimed, had a case in his written statement that he was not in possession of the plaint-properties or that he was not in sole possession of the plaint-properties and that the heirs were given their legitimate share of the

means profits. The lower court has not discussed this contention or recorded any definite finding thereon. It is also to be said that neither defendant 12 nor his Legal Representatives have filed any objection to the decree given to the plaintiff for means profits in respect of 1/18 share. In the circumstances, with a view to avoid further ~~any~~ delay and future complications, we would restrict the award of means profits to the plaintiff to the 1/18 share allowed by the lower court and refusing means profits in respect of the larger share which we are now awarding to him.

For the reasons stated above, we set aside the preliminary decree passed by the lower court and pass a fresh preliminary decree in the suit as follows:

It is hereby declared that the plaintiff is entitled to 5/18 of the plaint properties, defendants 8 and 10 are entitled to 2/18, and defendants 2, 3, 5, 6, 7 and 11 are entitled to 2/18. The share namely, 2/18, to which defendants 2, 3, 5, 6, ~~and~~ 7 and 11 are entitled, will be allotted as a common allotment for all those defendants together; and the share namely, 2/18, to which defendants 8 and 10 are entitled will be allotted as common allotment to those two defendants. The lower court will pass a final decree in pursuance of this preliminary decree dividing the properties by metes and bounds after issuing a commission. Plaintiff is allowed to recover from defendant 12 and his estate means profits from date of Ex-A14 to this date ~~and~~ for the share which the lower court has allowed to him by the preliminary decree. Parties will bear their ~~own~~ respective costs.

We are not passing any decree for means profits after this day, as we are appointing, hereby the Official Receiver functioning in the Tollygunge District Court, as Receiver

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for Kathcessa Kutty Umma's interest in the plaint properties
of the plaintiff propertier.
The meane profits realised by the Official Receiver will be
disbursed on application to the lower court in accordance
with the shares of the parties specified in this decree.

Regarding the administration of the property and
his remuneration, the Official Receiver will take orders
from the lower court.

C. Chennaraiyan
by -

7th March 1958.